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No. 00-1609

IN THE

Supreme Court of the United States

STATE OF TEXAS, *et al.*,

Petitioners,

v.

CHERYL J. HOPWOOD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AMERICAN COUNCIL ON EDUCATION, THE LAW SCHOOL ADMISSION COUNCIL AND THE GRADUATE MANAGEMENT ADMISSION COUNCIL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The State of Texas and related educational entities and officials present two questions in their Petition for a Writ of Certiorari. This *amicus* brief, however, addresses only part of the first question. More specifically, the question presented here is whether, in conflict with the Ninth Circuit and prior Supreme Court precedent, the Fifth Circuit erred in holding that the Fourteenth Amendment categorically prohibits state educational institutions from considering an applicant's race and/or ethnicity in order to obtain a diverse student body.

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Hopwood v. Texas, 21 F.3d 603 (5th Cir. 1994) 5

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Smith v. University of Wash. Law Sch., 233 F.3d 1188, 1192 (9th Cir. 2000), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 21, 2001) 10, 18, 19

Smith v. University of Wash. Law Sch., 233 F.3d 1188, 1192 (9th Cir. 2000), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 21, 2001) 10, 18, 19

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An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 Harv. L. Rev. 1357 (1996) 9, 11

B. Wildavsky, "What Happened to Minority Students?," *U.S. News & World Report* 28 (March 22, 1999) 12

J. Alger, *The Educational Value of Diversity*, 83 ACADEME 20 (Jan/Feb. 1997) 9, 11

J. Selingo, "Minority Applications Plummet at U. of Washington Law School," *The Chronicle of Higher Educ.*, (Today's News, Mar. 17, 1999) 13

L. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1 (1997) 10, 14

N. Rudenstine, *The Uses of Diversity*, 98 The Harvard Magazine 48 (1998) 8, 9

Cited Authorities

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"On The Importance of Diversity in Higher Education," *The New York Times* A27 (Apr. 24, 1997) 2

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INTEREST OF *AMICI CURIAE*

With the written consent of all parties, the Association of American Law Schools ("AALS"), the American Council on Education ("ACE"), the Law School Admission Council ("LSAC") and the Graduate Management Admission Council ("GMAC") respectfully submit this brief as *amici curiae* in support of the Petition for a Writ of Certiorari.[1]

AALS is a non-profit educational organization whose members consist of 164 ABA-approved law schools. AALS' primary mission is "the improvement of the legal profession through legal education." To that end, AALS bylaws require, among other things, that AALS members seek to have a "faculty, staff, and student body which are diverse with respect to race, color and sex." AALS Bylaw 6-4.c. Similarly, AALS' *Statement on Diversity, Equal Opportunity and Affirmative Action* emphasizes AALS' commitment to "equality of opportunity and diversity" and seeks "to increase the number of persons from underrepresented groups in law schools, in the legal profession and in the judiciary." AALS strongly believes that "broadening the boundaries of inclusiveness of American institutions is economically necessary, morally imperative, and constitutionally legitimate." *Id.* Consistent with that belief, most AALS member institutions have some form of a race-conscious admissions program.

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1. Counsel for AALS, ACE, LSAC and GMAC hereby confirm that they wholly authored this brief and that no person or entity other than AALS, ACE, LSAC and GMAC has made any monetary contribution to the brief's preparation or submission. Counsel for Petitioners and two of the Respondents have filed letters with the Court granting permission for all interested *amici* to file briefs in this case. The remaining necessary consent letter is being lodged herewith.

ACE is a non-profit educational association whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. Since its founding in 1918, ACE has sought to promote the highest standards in all aspects of higher education. As a leading participant in higher education affairs, ACE seeks to advance the interests of all members of the academic community, including students and the educational institutions themselves. ACE is dedicated to the principle that a strong higher educational system is the cornerstone of a democratic society. In furtherance of this principle, ACE supports diversity as a means of "enrich[ing] the educational experience," "promot[ing] personal growth," "strengthen[ing] communities and the workplace," and "enhanc[ing] America's economic competitiveness." *See* "On The Importance of Diversity in Higher Education," *The New York Times* A27 (Apr. 24, 1997). ACE is committed to helping its members "reach out and make a conscious effort to build healthy and diverse learning environments appropriate to their missions." *Id.*

LSAC is a nonprofit corporation whose members consist of 199 law schools in the United States and Canada. Founded in 1947, LSAC's mission is to coordinate, facilitate and enhance the law school admissions process. Through LSAC, law schools receive a variety of centralized services, such as the Law School Admission Test ("LSAT") and the Law School Data Assembly Service ("LSDAS"), which assist individual law schools in their admissions processes. LSAC conducts and funds extensive research on the LSAT, law school admissions, and other aspects of legal education, and has a longstanding commitment to ensuring equal access to legal education for members of minority groups. LSAC also participated as *amicus curiae* before the United States Supreme Court in *Regents of Cal. v. Bakke*, 438 U.S. 265 (1978).

Formed in the 1970's as a supporting organization for business schools, GMAC now has more than 135 university business school members. Among other activities, GMAC develops and administers the Graduate Management Assessment Test ("GMAT"), which is used by counselors and admission officers as one predictor of academic performance in graduate management schools. GMAC also conducts educational research, provides information to prospective students about business and management education, and provides other services to graduate schools of business. GMAC is committed to promoting the highest standards of professional business practices and to creating broad access to graduate management education. Consistent with these commitments, GMAC has undertaken several diversity initiatives, including the "Minority Summer Institute," "Destination MBA," "The PhD Project," and the "Diversity Pipeline Alliance." Through these initiatives, GMAC strives to increase the diversity of individuals who are seeking MBA or business doctorate degrees. One of GMAC's goals is to make graduate business education and degrees more available to historically underrepresented groups.

Collectively, AALS, ACE, LSAC and GMAC represent a significant percentage of the undergraduate and graduate academic institutions in this country. Based upon many years of first-hand experience, these institutions are convinced that student diversity is absolutely essential to the continued legitimacy and vibrancy of higher education. The Fifth Circuit's decision in *Hopwood* is fundamentally at odds with the missions of AALS, ACE, LSAC and GMAC as well as the admissions programs of most of their members. In light of this tension, and the legal conflict that *Hopwood* creates, the Court should grant Texas' petition to clarify the state of

the law and establish certainty within the academic community. At stake is the very future and vitality of America's higher education system.

STATEMENT OF THE CASE

Cheryl Hopwood, Douglas Carvell, Kenneth Elliot and David Rogers each sought admission to the University of Texas School of Law in 1992. When their admissions were denied, they brought a lawsuit against the University of Texas and several other entities and individuals alleging violations of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Each plaintiff claimed that he or she was denied admission because the School of Law's admissions program granted preferences to African-American and Mexican-American applicants. *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994).

After an eight-day bench trial in 1994, the district court concluded that *Regents of Cal. v. Bakke*, 438 U.S. 265 (1978), controlled the appropriate Fourteenth Amendment analysis. Applying *Bakke*, the court held that the law school's use of racial preferences for the purpose of achieving a diverse student body and to overcome the present effects of past discrimination served a compelling state interest. *Hopwood*, 861 F. Supp. at 569-73. Nonetheless, the court concluded that the law school's use of separate admissions procedures for African-Americans and Mexican-Americans was not narrowly tailored to achieve these compelling interests. *Id.* at 578-79. Because the law school had eliminated the perceived infirmity of its 1992 admissions program, however, the court declined to enter any injunctive relief. *Id.* at 582. The court also found that none of the plaintiffs would have been admitted to the law school even under a constitutionally permissible admissions process. *Id.* at 580-82. The court therefore awarded only declaratory relief. *Id.* at 582.

The court of appeals reversed, holding that the law school's use of racial preferences served no compelling state interest under the Fourteenth Amendment. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) ("*Hopwood II*").[2] In reaching this conclusion, the Fifth Circuit discounted *Bakke* because it felt that there was no majority holding on the compelling nature of diversity as a government goal and that, in any event, *Bakke* had been implicitly overruled by subsequent Supreme Court cases. *Hopwood II*, 78 F.3d at 944-45. Stopping short of issuing a permanent injunction, the court of appeals admonished the law school that it could not take race into account in admissions for the purpose, among other things, of "obtaining a diverse student body" or "remedying the present effects of past discrimination by actors other than the law school." *Id.* at 955. The *Hopwood II* panel then remanded the case back to the district court to apply a different burden of proof to the question of whether the plaintiffs would have been admitted to the law school under a color-blind admissions process. *Id.* at 955-57. A sharply divided appellate court denied rehearing *en banc* (*Hopwood v. Texas*, slip op. Nos. 94-50569, 94-50664, 1996 U.S. App. Lexis 9919 (5th Cir. Apr. 4,1996)), and this Court denied certiorari (*Hopwood v. Texas*, 518 U.S. 1033 (1996)).

On remand, the district court found that even applying a more exacting burden of proof, the law school prevailed in showing that none of the plaintiffs would have been admitted under a color-blind admissions process. *Hopwood v. Texas*, 999 F. Supp. 872, 879 (W.D. Tex. 1998). The court therefore

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2. The court of appeals had earlier affirmed the district court's denial of intervention for certain minority rights advocacy organizations. *See Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) ("*Hopwood I*"). This aspect of the case is not at issue here.

awarded only nominal damages and attorney's fees. *Id.* at 923-24. The court also entered a sweeping injunction prohibiting "the University of Texas School of Law and its officers in their official capacity . . . from taking into consideration racial preferences in the selection of those individuals to be admitted as students at the University of Texas School of Law." *Id.* at 923. Both sides appealed.

In considering the case for a second time, the Fifth Circuit repeated and reaffirmed its holding that the University of Texas School of Law may not justify ***any*** consideration of race in admissions based on the desire to have a racially and ethnically diverse student body. *Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) ("*Hopwood III*"). In so holding, the court of appeals explicitly recognized that its failure to follow *Bakke* placed it in direct conflict with a recent decision from the Ninth Circuit. *Id.* at 275 n.66. Nonetheless, the Fifth Circuit steadfastly maintained that while "[s]ome may think it imprudent for the *Hopwood II* panel to venture into unchartered waters by declaring the diversity rationale invalid, . . . the panel's ruling on diversity did not conflict directly with controlling Supreme Court precedent." *Id.* at 275. The court of appeals reaffirmed the *Hopwood II* panel's further holding that the Fourteenth Amendment also prohibited the law school from considering its applicants' race in order "to eliminate any present effects of past discrimination by actors other than the law school." *Id.* at 272. Affirming the district court's denial of actual damages to any of the plaintiffs, the Fifth Circuit then reversed the district court's broad injunction largely because it lacked the necessary factual and legal predicate. However, the court also noted that the injunction went beyond the holding of *Hopwood II*. *Id.* at 276-77. Pursuant to *Hopwood III*, therefore, an academic department within a state

educational system is foreclosed from considering race in its admissions process except for the very limited purpose of remedying demonstrable past discrimination specifically practiced by that department.

REASONS FOR GRANTING THE WRIT

Educators have long recognized that one of their missions in higher education is to produce broadly educated individuals who are prepared to become future leaders and good citizens within the context of an increasingly multi-cultural society. In fulfillment of this mission, colleges, universities and professional schools have sought to create a diverse and varied learning environment for their students. Most higher educational institutions have acknowledged that race and ethnicity must play a limited but critical role in the creation of this environment. As a result, almost all of these institutions have some form of a race-conscious admissions program. The petition presented by the University of Texas and related entities raises fundamental questions concerning the legality of such programs and implicates issues of academic freedom and the First Amendment. Given academia's firm conviction that diversity on campuses is vital to an informed and responsible student body, as well as a healthy democracy, the question of what steps are constitutionally permissible to achieve such diversity lies at the very core of public higher education's mandate. The widespread use of race-conscious admissions programs to promote diversity underscores the national significance of this issue and the need for clarification and guidance from this Court.

Indeed, whether the Fourteenth Amendment allows public educators to consider race and ethnicity in their admissions processes in order to create a diverse student body

has vexed the lower courts ever since this Court handed down its fragmented decision in *Bakke*. Since *Bakke*, few courts have been willing to tackle the issue directly. Recently, however, two circuits have taken wholly conflicting stands on the matter. While the Ninth Circuit has held that the constitution allows public law schools to consider race or ethnicity in their admissions processes in order to promote diversity in their student populations, the Fifth Circuit has reached the opposite conclusion. District courts in other circuits have likewise splintered over the meaning and import of *Bakke* and the constitutional limits on diversity in higher education. The Court should grant the University of Texas' petition in order to resolve these conflicts and create a uniform body of law in this critical area.

I.

THE PETITION PRESENTS A CONSTITUTIONAL ISSUE OF GREAT NATIONAL IMPORTANCE

A. Race Is A Critical Component In Most Admission Programs For Higher Education

Whether an institution of higher education may ever consider race or national origin as a factor in its admissions process in order to enroll a diverse student body has profound implications for the entire academic community. Educators have held diversity in high esteem for more than a century. N. Rudenstine, *The Uses of Diversity*, 98 The Harvard Magazine 48, 49 (1998).[3] As early as the mid-nineteenth century, diversity was recognized as a necessary component

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3. Counsel for *amici* would be happy to make any book or article cited in this brief available to the Court.

of the education of citizens in a heterogeneous democracy. *Id.* at 50. By the end of the nineteenth and the beginning of the twentieth centuries, diversity in education became a more explicit goal. *Id.* at 50-51. As the nation matured in complexity, this vision of diversity grew to include students of different races, religions and skin colors. *Id.* at 55.

"[M]uch of the point of education is to teach students how others think and to help them understand different points of view — to teach students to be sovereign, responsible, and informed citizens in a heterogeneous democracy." A. Amar & N. Katyal, *Bakke's Fate*, 43 U.C.L.A. L. Rev. 1745, 1774 (1996). In this respect, diversity in education serves unique and special purposes not found in other social sectors. *See* Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 Harv. L. Rev. 1357, 1358, 1366-73 (1996) ("*Evidentiary Framework for Diversity*") (arguing that in examining the value of diversity in higher education, "courts should consider the unique nature of diversity in education and the protection afforded academic [judgment]"); J. Alger, *The Educational Value of Diversity*, 83 ACADEME 20 (Jan/Feb. 1997) (diversity serves "as a controlled microcosm previewing the larger society and working world into which the student will graduate"). As one Harvard University President has noted, "diversity is not an end in itself, or a pleasant but dispensable accessory. It is the substance from which much human learning, understanding, and wisdom derive. It offers one of the most powerful ways of creating the intellectual energy and robustness that lead to greater knowledge." *Evidentiary Framework for Diversity*, 109 Harv. L. Rev. at 1372-73 (quoting *N. Rudenstine, Harvard Univ., The President's Report 1993-95*).

In considering who will not only meet the academic standards set by the institution, but will also materially contribute to the overall educational process, most higher educational institutions have never considered "merit" to be solely a function of "quantifiable criteria." W. Bowen & D. Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, at 26 (1998) ("*The Shape of the River*"). Thus, while the vast majority of American university, graduate and professional schools rely primarily on standardized test scores and college grade point averages to determine admissions, they have never used such measures exclusively. *See, e.g.*, L. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1, 16-17 (1997) ("*The Threat to Diversity in Legal Education*") (along with lower-scoring minority applicants, lower-scoring white applicants with certain attributes are also given special consideration in the law school admission process). Instead, selective schools generally end up with a very large group of applicants who are deemed capable of doing good work and whose admission will depend on a variety of factors, including, perhaps, an individual's race. *See, e.g., Harvard College Admissions Program*, attached as Appendix to Justice Powell's opinion in *Bakke*, 438 U.S. at 321; *Smith v. University of Wash. Law Sch.*, 233 F.3d 1188, 1192 (9th Cir. 2000), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Feb. 21, 2001) (No. 00-1341); *Hopwood*, 999 F. Supp. at 879–81.

The educational organizations participating as *amici curiae* in this case represent a vast segment of higher education. *See supra*, pp. 1-3. It is the experienced opinion of the *amici* and their members, as well as the opinion of

numerous other educational institutions, that achieving racial and ethnic diversity in higher education is a social imperative. *Cf. Gratz v. Bollinger*, 122 F. Supp. 811, 823 (E.D. Mich. 2000) (noting the abundance of *amici* who concur "that diversity results in a richer educational experience for students").[4] The widespread consideration of race and ethnicity in higher education admissions processes not only underscores the value educators feel diversity plays in higher education, but also highlights the critical importance of the constitutional issue before the Court.

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4. In concluding that racial and ethnic diversity serves an important educational purpose, educators fully embrace the notion that not all members of a particular race or ethnic group think alike. *The Educational Value of Diversity*, 83 ACADEME at 21. Indeed, this is part of the educational point that diversity makes. The fact that some individuals from the same racial or ethnic background may not share a common viewpoint is itself a valuable lesson — and a lesson to be learned by every student regardless of his or her race or background. *Id.*; *see also The Shape of the River* at 280 ("The black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx"); *Bakke*'s Fate at 1778 (with a diverse student body, white students learn from black students and vice-versa). Moreover, it is a reality of American society that race almost always affects an individual's life experiences and perspectives, and, therefore, what one brings to a learning environment. Note, *The Wisdom and Constitutionality of Race-Based Decision-Making in Higher Education Admissions Programs: A Critical Look at Hopwood v. Texas*, 48 Case W. Res. L. Rev. 133, 161 & n.171 (1998) ("*A Critical Look at Hopwood v. Texas*"). To deny this reality is to deny the history and social fabric of this country. *Id.*; *see also Evidentiary Framework for Diversity*, 109 Harv. L. Rev. at 1366-67 (noting that numerous studies and testimonials document the fact that "[i]n American society, race powerfully influences an individual's life experiences").

In holding that diversity can never justify consideration of race or ethnicity in admissions, the Fifth Circuit's holding has placed public higher education admissions programs in jeopardy, thereby creating uncertainty and apprehension within the academic community. But because educational institutions perceive racial and ethnic diversity as such an important educational goal, and because they are committed to preserving a reputation of accessibility, openness and inclusiveness, such institutions have continued to place paramount importance on diversity despite the uncertainty of the law. Indeed, in those states in which affirmative action is under attack, educators are seeking to find other, albeit less satisfactory, ways to achieve the goal of diversity and to make clear that their doors are still open to everyone. *See, e.g.*, B. Wildavsky, "What Happened to Minority Students?," *U.S. News & World Report* 28-29 (March 22, 1999) (in those states in which affirmative action is under attack, schools are trying to come up with other ways to boost minority enrollment; Texas, for instance, has implemented a rule accepting all in-state students for undergraduate admissions who graduate in the top ten percent of their respective high school class into the University of Texas system). And those states whose higher education admissions programs have not yet been challenged are likely to continue considering race in their admissions processes despite their exposure to costly legal battles. *Cf. Hopwood*, 999 F. Supp. 872, 923 ("outrageous requests for damages illustrate the significant financial risks federally funded state universities face when routine admission decisions are challenged . . . [and, m]oreover, the specter of large compensatory damages awards could threaten to compromise the integrity of the admissions process itself"). States are willing to face the threat of litigation because the alternative is so daunting. For instance, the year after the University of Texas School

of Law instituted an admissions policy that did not, in any way, consider race in the admissions process, African-American student admissions fell 83 percent and Mexican-American admissions fell 51 percent. *A Critical Look at Hopwood v. Texas*, 48 Case W. Res. at 133.

This precipitous drop cannot be wholly explained by a lack of minority law school applicants with high enough "objective" numbers. Minority applicants are also perceiving the institution as hostile or isolating for them, and therefore are applying elsewhere. *See* P. Applebome, "Universities Report Less Minority Interest After Action to Ban Preferences," *The New York Times* B12 (Mar. 19, 1997). The same drastic reduction in the number of minorities was noted in the University of California's three law schools and the University of Washington law school the year after state citizens voted to end race preferences there. *See* R. Whitman, *Affirmative Action on Campus: The Legal and Practical Challenges*, 24 J.C. & U. L. 637, 663 (Spring 1998) (in California, African-American enrollees dropped 63 percent, Native American enrollees dropped 60 percent, and Hispanic enrollees dropped 34 percent); J. Selingo, "Minority Applications Plummet at U. of Washington Law School," *The Chronicle of Higher Educ.*, (Today's News, Mar. 17, 1999) (available online) (number of African-American applicants dropped 41 percent; Filipino applicants dropped 26 percent; Hispanic applicants dropped 26 percent). While minority enrollment at these institutions has increased somewhat, *see Petitioners' Brief* at 19, it remains woefully inadequate and well below levels achieved using affirmative action. Studies projecting the effect of a race-neutral admissions process on minority enrollment in professional schools confirm that the alarming numbers in Texas, California and Washington are not aberrations.

See, e.g., The Threat to Diversity in Legal Education, 72 N.Y.U. L. Rev. at 15-16 (setting out study which concludes that of the 3,435 African-American applicants who were accepted to at least one law school to which they applied in 1991, only 687 would have been admitted if LSAT's and GPA's were the sole criteria for admissions).

Educators should not be forced into the Hobson's choice of fulfilling their missions of preparing students for life in a heterogenous society and risking significant litigation, or abandoning diversity as an institutional goal at the expense of the institution's integrity and reputation. Nor should educators be forced to invent imperfect proxies for race and ethnicity if a narrowly tailored race-conscious program designed to foster diversity would pass constitutional muster. Because the wholesale inability to consider race in higher education admissions programs portends a return to elite educational institutions which exclude minorities, the critical importance of this constitutional issue cannot be gainsaid. Higher education has a need, and the right, to know what the future holds for its public institutions. This Court should declare the state of the law so that, whatever the constitutional parameters might be, higher educational institutions can move forward and develop permissible, long-range admissions programs that maximize the admission of a diverse and an academically excellent student population.

B. The *Hopwood* Decision Implicates Academic Freedom And The First Amendment

American higher education has gained world prominence due, in part, to its autonomy and freedom from governmental interference. *The Shape of the River* at 287. This Court has long recognized that academic freedom is essential to

safeguard "[t]eachers and students [who] must always remain free to inquire, to study and to evaluate." *Keyishian v. Board of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (quotations and citation omitted). Justice Frankfurter, for example, acknowledged the historic independence of educational institutions and set out the "four essential freedoms of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and ***who may be admitted to study***." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added). Since *Sweezy*, this Court has often repeated its resolve to defer to educators exercising academic judgment in these areas. *See, e.g.*, *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973); *Board of Curators v. Horowitz*, 435 U.S. 78, 89-90 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

Consistent with this reasoning, Justice Powell recognized in *Bakke* that "a countervailing constitutional interest, that of the First Amendment," is implicated in connection with the right of universities "to select those students who will contribute the most to the 'robust exchange of ideas'. . . ." 438 U.S. at 313. Protecting the "robust exchange of ideas" follows from the First Amendment's protection of the "marketplace of ideas" (*Red Lion Co. v. FCC*, 395 U.S. 367, 390 (1969)), which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). As this Court has noted, "[the] college classroom with its surrounding environs" constitutes a "peculiarly" strong "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972).

Academia's collective wisdom counsels that racial and ethnic diversity serves an imperative educational purpose. By failing to recognize the compelling state interest in a racially and ethnically diverse student population, the Fifth Circuit has cast a shadow over academic freedom and the First Amendment, threatening academia's freedom to make autonomous decisions concerning who will best contribute to the educational process and "the robust exchange of ideas" on campuses. This petition therefore raises serious questions about the scope and role of academic freedom and the First Amendment in an Equal Protection analysis involving public educational institutions. Such weighty issues deserve this Court's attention.

II.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND WITH A DECISION FROM THE NINTH CIRCUIT

In *Bakke*, this Court was confronted with the legality of a medical school admissions program at the University of California at Davis. The Davis plan set aside a number of positions for African-Americans. *Bakke*, 438 U.S. at 274-75. In striking down the set-asides, the Court was extremely divided in its reasoning. Four justices held that the program was constitutional (*id.* at 325-26); four justices held that the plan violated Title VI and that the constitutional question need not be decided (*id.* at 411-12, 421); and one justice, Justice Powell, held that the particular admissions program at issue was unconstitutional but that other race-conscious admissions programs could survive constitutional scrutiny if enacted to assemble a diverse student body and if

race were only one of numerous factors favoring admission (*id.* at 311-19). Justice Powell's opinion garnered majority support in at least one important respect: five justices joined in holding that public higher educational institutions have "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320. Otherwise, the four justices who would have upheld the admissions plan at issue felt that Justice Powell's opinion did not go far enough. *Id.* at 324-26. As a result, Justice Powell's opinion sets out the narrowest grounds for upholding race-conscious admissions programs and, under the principles of judicial interpretation enunciated by this Court, it is therefore the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

This Court has never overruled *Bakke*. Indeed, Justice O'Connor indicated in a concurring opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986), that the *Bakke* Court had previously found that racial diversity constituted a compelling interest, at least in the higher education context. In addition, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 258 (1995), Justice Stevens noted in his dissent that the Court was not overruling that aspect of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which recognized that diversity "may provide a sufficient interest to justify [racial classifications]."

The Fifth Circuit discounted the *Marks* analysis and the opinions of Justices O'Connor and Stevens and held that it

was free to conclude that diversity is not a compelling state interest justifying the consideration of race in a state's admissions process. *See Hopwood III*, 236 F.3d at 272-75. Such a holding is unprecedented among the circuits. *See, e.g., Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 748 (2d Cir. 2000) (recognizing that the Fifth Circuit is the only appellate court since *Bakke* to have rejected diversity as a compelling interest); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999) (same), *cert. dismissed*, 529 U.S. 1050 (2000); *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) (same).

Recently, the Ninth Circuit reached the exact opposite conclusion. In *Smith*, 233 F.3d at 1200, the Ninth Circuit held that, under *Bakke*, diversity is a compelling state interest that allows admissions officers to consider, on some level, the race and ethnicity of their applicants. Thus, the conflict between the Fifth and Ninth Circuits is two-fold. First, these two circuits squarely disagree over the precedential value of *Bakke*. *See Hopwood III*, 236 F.3d at 275 n.66 (explicitly recognizing conflict over meaning of *Bakke*); *Smith*, 233 F.3d at 1200 n.9 (same). Second, the two courts also disagree on the central question of whether diversity can ever justify the consideration of race in a state's higher education admissions process. *Hopwood III* at 274; *Smith*, 233 at 1200-01.

The confusion among the courts does not end with the Fifth and Ninth Circuits. The district courts have also divided over the issue. At least two district courts have followed the reasoning of Fifth Circuit to conclude that *Bakke*'s diversity holding is non-binding and that diversity can never justify race-conscious admissions programs. *See, e.g., Grutter v. Bollinger*, slip op., No. 97CV75928-DT, 2001 U.S. Dist. Lexis

3256 at *66 (E.D. Mich. Mar. 27, 2001) (concluding that "*Bakke* did not hold that a state educational institution's desire to assemble a racially diverse student body is a compelling state interest); *Johnson v. Board of Regents of Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1369 (S.D. Ga. 2000) (concluding that Justice Powell's opinion in *Bakke* carries no precedential weight with respect to the issue of diversity). In contrast, at least one district court has agreed with the Ninth Circuit's holding. *See Gratz*, 122 F. Supp. 2d at 820. Among the circuit courts, several have avoided the *Bakke* debate altogether by assuming that diversity is a compelling state issue but striking down various admissions programs on other grounds. *See, e.g.*, *Wessmann*, 160 F.3d at 796 (assuming "diversity" is constitutionally permissible goal, middle/high school admissions program was not "narrowly tailored" to meet this goal); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 131 (4th Cir. 1999) (same with respect to elementary school admissions program), *cert. denied*, 529 U.S. 1019 (2000); *Tuttle*, 195 F.3d at 705 (same with respect to kindergarten admissions).

Given these decisions, the vitality of *Bakke* is now squarely in dispute. Rather than allow the lower courts to continue to second-guess the meaning and status of *Bakke*, this Court should decide *Bakke*'s fate. Whether Justice Powell's opinion continues to have the force of law, or whether *Bakke* should be modified or overruled, is a decision which lies solely within the providence of this Court. Indeed, in considering the thorny issue of the place of race in a state admissions process, the courts themselves have repeatedly voiced the need for guidance from this Court. *See, e.g., Hopwood III*, 236 F.3d at 275 ("Some may think it was imprudent of the *Hopwood II* panel to venture into unchartered waters by declaring the diversity rationale invalid"); *Smith*, 233 F.3d at 1200 (Supreme Court must decide whether the *Bakke* opinion remains good law); *Eisenberg*, 197

F.3d at 131 (because Supreme Court has not decided whether diversity can be compelling state interest justifying consideration of race in admissions programs, court likewise declines to decide it); *Tuttle*, 195 F.3d at 705 ("Until Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest"); *Wessmann*, 160 F.3d at 796 (absent clear signal from the Supreme Court, court of appeals is "unprepared" to hold that "diversity is not a sufficiently compelling interest to justify a race-based classification"); *Grutter*, 2001 U.S. Dist. Lexis at *77 n.34 (acknowledging that the status of the *Bakke* opinion "has been the subject of much debate and disagreement"). The time is ripe for the Court to clarify this area of the law and to bring uniformity among the circuits.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, preferably to address all of the issues raised therein, but at a minimum, to resolve the issue of the ability of higher education to consider race in its attempt to foster diversity in its student population. The need for guidance is becoming increasingly apparent as more and more challenges are being mounted to race-conscious admissions programs and the courts continue to divide over the issue and over the precedential weight of *Bakke*. Only this Court can, and should, proclaim the meaning of *Bakke* and delineate the role of academic freedom and the First Amendment in a Fourteenth Amendment challenge to a public higher educational institution's decision on who it will admit to study at its campus. These issues are of extreme importance not only to the academic community but to society as a whole.

Respectfully submitted,

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